



BEST PRACTICES:

CLEAN SLATE AND IMMIGRANTS

Generally, convictions can still make immigrants deportable, even if those convictions have been “expunged.”¹ The only way to completely eliminate the deportation consequences of a conviction is by vacating it based on a ground of “legal or procedural invalidity.”

Once a conviction has been “expunged,” it can still pose major hurdles for immigrants trying to prove eligibility for certain immigration benefits, like citizenship.

The growing national effort to expand access to, and automate, state record clearance carries great promise, but unless it considers the unique needs of immigrants, it could create unintended consequences.

The following are some best practices for advocates and stakeholders working on these laws to ensure that the unique needs of immigrants with convictions are taken into account.

- **Include the option of vacatur for cause**
- **Ensure courts retain future jurisdiction**
- **Ensure individuals can still access expunged and/or sealed records**
- **Eliminate expunged convictions from federal databases and ensure the Department of Homeland Security does not have access**
- **When advocating for the bill and implementing it, prioritize public education and community partnerships with immigrant stakeholders**

¹ See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). There are two primary exceptions to this rule. First, an expungement will remove a conviction as an automatic bar to Deferred Action for Childhood Arrivals (DACA). Second, in immigration proceedings in the Ninth Circuit only, state rehabilitative relief will eliminate all immigration consequences of certain minor drug convictions that occurred on or before July 14, 2011. See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). In addition, in some instances, an expungement may be viewed as a positive factor for discretionary immigration relief.

Include the option of vacatur for cause.

Most record clearance or expungement laws do not contain a provision allowing people to vacate the underlying charge on the basis of legal or procedural invalidity. However, if you are creating a new expungement law, or amending an existing one, for immigrant defendants it is critical to include a potential ground for expungement and/or vacatur for “legal error” or to remedy “procedural or substantive defect.” This provides a strong argument that the immigration consequences of the conviction are erased.

Sample legislative language: “An expungement may be based on equitable factors or to correct a procedural or substantive defect in the underlying proceeding.”

Alternative sample language, specifying immigrants: “There is a rebuttable presumption that due to legal error, a noncitizen defendant was not aware of the immigration consequences of the plea, and the plea therefore is legally invalid.”

Add language in court orders: “If the state advocacy includes the creation of forms or orders granting the expungement, for immigration purposes it is critical the court orders indicate the conviction was vacated on the “grounds of legal invalidity.”

Ensure courts retain future jurisdiction.

Some state courts mistakenly hold that an expungement deprives the court of future jurisdiction to vacate that same conviction for cause. If you are not sure what the established law is on this matter within in your state, the best practice is to address the jurisdiction issue directly in the legislation. As noted above, many immigrants may need to vacate the conviction for cause at some later date.

Sample legislative language: “An expungement performed pursuant to this section will not preclude the court’s jurisdiction over any subsequently filed motion to amend the record, post-conviction relief motion or petition, or any other future collateral attack on an expunged

Ensure impacted individuals can still access expunged and/or sealed records.

Some states hold that once a conviction is expunged or sealed, the individual can no longer access copies of their own record or can only access those records if they get a court order. This can be very problematic for noncitizens. For example, if a noncitizen defendant is trying to prove eligibility for some immigration benefit, like naturalization, they may need to prove that their expunged conviction is not a bar to eligibility. They may need to show conviction records that prove that even though the “conviction” still may exist for immigration purposes, it did not involve the type of crime that would be a bar. If their expunged conviction has been sealed, they may not be able to prove this. In addition, especially as ICE increases its presence in and around state courthouses, simply going to some courthouses to obtain an order can be dangerous and ill-advised for noncitizens. To avoid this problem, consider affirmatively addressing the issue in the legislation.

Sample legislative language: “Any individual who has received an expungement may access information contained in expunged records without first obtaining a court order.”

Eliminate expunged convictions from federal records and ensure the Department of Homeland Security does not have access.

Contact with the criminal legal system is the number one way that immigrants end up in the deportation system. It is worth the time to ensure that state expunged convictions and their underlying arrests are eliminated from federal RAP sheets and databases, including FBI and Department of Homeland Security databases. Under the National Crime Prevention and Privacy Compact Act, which the majority of states have ratified, a state expungement should be immediately deleted from some federal databases. This does not always happen, however. It's worth investigating how a state expungement will appear on the various national federal databases, including through the Interstate Identification System, otherwise known as the "Ill System," which is a centralized system that also includes other database records. Ensure that expunged records do not appear in the Ill System or in other federal databases. It's also important to ensure that states are not sharing these records with the Department of Homeland Security through other means such as through state contracts that allow for direct access.

Sample legislative language: All records subject to state expungement under this law shall not be shared with federal law enforcement offices and shall not appear on federal law enforcement databases.

When advocating for the bill and implementing it, prioritize public education and community partnerships.

Many immigrants do not know that rehabilitative relief has such limited immigration use. Based on advice that the conviction is now "eliminated," they may put themselves at great risk by submitting some immigration application when in fact the conviction disqualifies them. It is worth thinking through public advisements and community partnerships to ensure that the immigrant community is well-informed about what impact, if any, the new record clearance law will have on their immigration case.

We at the ILRC are committed to helping advocates run these bills in a thoughtful way that maximizes the benefits and reduces the harm of state record clearance for immigrants. To receive free technical assistance please reach out to Rose Cahn, rcahn@ilrc.org.